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In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department,

Petitioner,

vs.

FRANCIS MUSCARE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Judicial Circuit

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BRIEF FOR THE CHICAGO PATROLMEN'S ASSOCIATION AMICUS CURIAE

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

Established in 1916, the Chicago Patrolmen's Association is an Illinois not-for-profit corporation consisting of approximately four thousand police officer members of the Chicago Police Department. The purposes of the organi-

zation are to promote intellectual, social and economic interests of its membership. The Association is interested in all matters which bear directly upon the working conditions and job security of its members.

The *Amicus* is particularly interested in the case now before the Court because its membership is now, because of the Illinois Supreme Court's recent decision in *Kropel* v. *Conlisk*, 60 Ill.2d 17 (1975), subject to the same general statutory "protection" afforded to the Respondent fireman in this case. Under pressure from the courts, particularly the United States Court of Appeals for the Seventh Circuit in its opinion now under review, *Muscare* v. *Quinn*, 520 F.2d 1212 (1975), the Chicago Police Department has recently adopted General Order number 75-22, effective December 15, 1975, which apparently grants many of the pre-suspension rights Respondent seeks in this case to Chicago police officers. An anomalous situation now exists in the City of Chicago in which those individuals electing to fight fires for a living are governed by a different set of procedural job protection rules than those who fight crime. Clearly there is no reasonable basis for this type of distinction.

The *Amicus* is interested in having its membership's newly vested rights made a matter of constitutional guarantee rather than legislative grace, and it urges this Court to so hold.

QUESTIONS PRESENTED

Recognizing that there may be valid distinctions in drafting regulations pertaining to permitted hair styles for police officers and firemen (*see, e.g., Black* v. *Rizzo*, 360 F.Supp. 648 (E.D.Pa.1973)) and noting that the Court has recently heard argument in a case involving a police officer's hair style, *Kelley* v. *Johnson*, ... U.S. ....., 44 LW 3034-3035, this brief is directed solely to these questions:

(1) Whether the Due Process Clause of the Fourteenth Amendment demands that a permanent public employee threatened with suspension from his employment be granted a hearing of some sort prior to his suspension—no matter what its length.

(2) Whether a state statute which provides for only post suspension review of suspensions for more than five days and no review for suspensions of less than five days can stand against this Court's decision in *Goss* v. *Lopez*, 419 U.S. 565 (1975).

ARGUMENT

I.

RESPONDENT HAS CONSTITUTIONALLY COGNIZABLE PROPERTY AND LIBERTY INTERESTS IN HIS GOVERNMENT EMPLOYMENT.

A. The decisions of this Court have held that a government employee has a property interest in his employment which is protected by the Due Process Clause of the Fourteenth Amendment.

In the leading decisions of *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564 (1972) and *Perry* v. *Sindermann,* 408 U.S. 593 (1972), this Court has held that employees of the State could have property interests in their employment protected by procedural due process. Writing the opinion of the Court in *Roth,* Mr. Justice Stewart concluded that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S., at 577.

This conclusion has been reaffirmed and applied to a federal government employee in this Court's recent decision in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). In that case, Kennedy was a nonprobationary federal employee in the competitive Civil Service. He was removed from the federal service pursuant to the provisions of the Lloyd-LaFollette Act. Although the five opinions filed in that decision make its import less than clear, all nine Justices conceded that the employee had a property interest in his expectancy of continued employment. Writing the opinion of the Court, Mr. Justice Rehnquist cited the above quoted language from *Roth* and found: "Here appellee did have a statutory expectancy that he not be removed other than for 'such cause as will promote the efficiency of the service.' " 416 U.S., at 151-152. The Illinois civil service statute which applies to the Respondent's terms of employment also provides that "no officer or employee in the classified civil service . . . may be removed or discharged, or suspended for a period of more than 30 days, except for cause. . . ." Illinois Revised Statutes (1973), ch. 24, par. 10-1-18. It is clear that Respondent had a protected property interest in his employment as that term has been defined by the decisions of this Court.

It is settled that once one establishes a valid property interest the procedural protections afforded by the Fourteenth Amendment's Due Process Clause become applicable. Mr. Justice Stewart makes this point explicit in *Roth:* "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." 408 U.S., at 576. This Court has on numerous occasions found that public employees have interests in continued employment that are safeguarded by due process. *See Wieman* v. *Updegraff,* 344 U.S. 183 (1952), *Slochower* v. *Board of Education,* 350 U.S. 551 (1956), and *Connell* v. *Higginbotham,* 403 U.S. 207 (1971). Given this precedent, the opinion of the Court in *Arnett* is somewhat unsettling. In it, Mr. Justice Rehnquist concluded that although the employee had a property interest in his employment, this interest was protected only by the procedural safeguards afforded by the

same legislation that vested the property interest in him, and not by the Due Process Clause of the Fourteenth Amendment: "We, of course, find no constitutional overtones lurking in the statutory issue, because of our holding as to the nature of appellee's property interest in his employment." 416 U.S., at 155, *fn.* 21. Six other Justices disagreed with this view. Mr. Justice Powell's opinion typifies the character of that disagreement: "It seems to me that this approach is incompatible with the principles laid down in *Roth* and *Sindermann*. . . . This view misconceives the origin of the right to procedural due process. That right is conferred not by legislative grace, but by constitutional guarantee." 416 U.S., at 166-167. Despite the statutory construction approach of the opinion of the Court in *Arnett,* and given the inclination of the clear majority of Justices to adhere to *Roth,* interpreting it as providing constitutionally contoured due process protections to those property interests government employees hold in their jobs, that case must be read to affirm the view that once a State statute or regulation grants a public employee a property interest in his employment, the Constitution guarantees him due process of law before that interest can be infringed.

Although the Respondent's employment has only been suspended and not terminated, he is still entitled to procedural due process protections. The cases cited to support due process protections for deprivations of employment "property" interests involved final termination of employment. However, there is ample precedent holding that "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Roth,* 408 U.S., at 570-571 citing *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972). "The Court's view has been that as long as a

property deprivation is not *de minimis,* its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Goss* v. *Lopez,* 419 U.S. 565, 576 (1975) citing *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 342 (1969); *Boddie* v. *Connecticut,* 401 U.S. 371, 378-379 (1971). *See Fuentes* v. *Shevin,* 407 U.S. 67, 86 (1972). Inasmuch as the Respondent's twenty-nine day suspension can hardly be considered *de minimis,* it must qualify as a deprivation subject to the protections afforded by due process.

B. Where one's reputation or integrity is called into question, the decisions of this Court demand that the government provide the fundamentals of due process to allow their vindication.

Even where the Court has failed to find an interest that could be validly characterized as one relating to property, it has held that the due process protections of the Fifth and Fourteenth Amendments are applicable where a person's integrity is challenged by the government in its attempt to remove him from its employment. This Court has characterized such an interest as one in "liberty" and has sketched the contours of its protection. In *Roth* Mr. Justice Stewart, though finding the argument inapplicable to the facts at hand, wrote for the Court "In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. (Citations omitted) . . . For "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 408 U.S., at 572-573 citing *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971); *Wieman supra* at 191; *Joint Anti-Fascist Refugee Committee* v. *McGarth,* 341 U.S. 123 (1958); *United States* v. *Lovett,* 328 U.S. 303, 316-

317 (1946); *Peters* v. *Hobby*, 349 U.S. 331, 352 (Douglas, J., concurring) (1955).

In the case at bar, Respondent was suspended from his employment not only for refusing to remove his beard but for insubordination as defined in Section 61.006 of the Rules and Regulations of the Chicago Fire Department. In paramilitary organizations such as the police and fire departments of municipal governments, such an accusation is an extremely serious one going to one's "reputation, honor, or integrity." Given the public interest and safety these employees are charged with protecting, an allegation of insubordination, even if unsubstantiated, necessarily would demean these employees in the eyes of their co-workers and in the community in which they live. In considering the effect of a short suspension from school on several high schocl students, this Court reviewed the charges of misconduct and concluded:

> "It sustained and recorded, those charges could seriously damage the students standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution." (footnote omitted) *Goss* v. *Lopez*, 419 U.S., at 575.

Respondent's twenty-five day suspension is certainly as serious as the ten day suspensions involved in *Goss* and the charge of disobeying a superior officer is at least as serious as the misconduct charges involved in that case. These facts militate for a finding that the Respondent was entitled to due process protection to safeguard his good name.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE DECISIONS OF THIS COURT APPLYING IT TO SIMILAR FACTS DICTATE THAT THE RESPONDENT BE GIVEN A HEARING PRIOR TO HIS SUSPENSION FROM GOVERNMENT EMPLOYMENT.

A. Except in the case of an emergency, due process in the case of an employee suspended or dismissed from government employment means granting a presuspension or pretermination hearing in some form to the employee at which he could present his view of the facts.

Determining what due process requires has proven to be a more difficult and complicated task for the courts than establishing what constitute the property and liberty interests entitled to its protection. Mr. Chief Justice Burger writing the opinion of the Court in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) noted: "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." 408 U.S., at 481. The fundamental principle this Court has consistently applied in a lengthening line of decisions granting pretermination and presuspension hearings is "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). Although the case did not involve government employment rights, *Boddie* v. *Connecticut*, 401 U.S. 371

(1971) provides a good summary of the holdings of this Court's relevant decisions. Mr. Justice Harlan there wrote:

> "The formality and procedural requisites for the hearing may vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event." (footnotes omitted) 401 U.S., at 378-379.

The applicability of the pretermination hearing requirement has been made by this Court in a wide variety of factual contexts: *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), termination of welfare benefits; *Bell* v. *Burson,* 402 U.S. 535 (1971), suspension of driver's license; *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) revocation of parole; *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), seizure of property on a prejudgment writ of replevin; and *Goss* v. *Lopez,* 419 U.S. 565 (1975), suspension of high school students. Citing *Boddie, Bell* and *Goldberg,* Mr. Justice Stewart, writing for the Court in *Board of Regents* v. *Roth,* routinely applied the pretermination hearing requirement to the case of a governmental employee facing discharge. 408 U.S. 564, 570-571, fn 7-8.

Arnett v. *Kennedy,* 416 U.S. 134 (1974) and *Goss* v. *Lopez,* 419 U.S. 565 (1975) when read together present the current state of the law with respect to the necessity of pretermination or presuspension hearings. Given the facts in *Arnett,* this Court held that the federal employee there had no constitutional right to a full evidentiary type hearing before being discharged from his employment. The

decision was very heavily dependent upon the Court's construction of the Lloyd-LaFollette Act which was held to create this employee's property interest in his job. But that legislation not only guaranteed a property interest in employment, it also provided a number of pretermination rights for the employee: "30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based . . . the right to respond to the charges both orally and in writing . . . an opportunity to appear personally before the official having the authority to make or recommend the final decision." 416 U.S., at 170. *Arnett* seems to hold that where the protections provided government employees are essentially equivalent to a pretermination hearing, these procedures satisfy due process requirements. The lower courts seem to have interpreted *Arnett* in this fashion in that no case has specifically upheld the constitutionality of a post-discharge hearing procedure in the absence of some pretermination protections. *See Eley* v. *Morris,* 390 F. Supp. 913, 923 (N.D. Ga. 1975).

Goss v. *Lopez* held that "students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing." 419 U.S., at 579. Specifically Mr. Justice White, who delivered the opinion of the Court, concluded "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U.S., at 581. With respect to the timing of this hearing he continued: "Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school." 419 U.S., at 582. Where a stu-

dent poses some threat to the school, "the necessary notice and rudimentary hearing should follow as soon as practicable. . . " 419 U.S., at 582-583.

Given the facts that a twenty-nine day suspension from employment is a serious and substantial deprivation of property, the Illinois statute governing such suspensions provides none of the pretermination rights found in the Lloyd-LaFollette Act, Illinois Revised Statutes (1973) ch. 24, par. 10-1-18, and this Court's decisions have consistently foudn pretermination protections necessary to due process in government employment situations, the Respondent was entitled to a hearing of the sort suggested in *Goss* before he was suspended from his employment.

B. The Chicago Fire Department's perceived need to temporarily suspend the Respondent from his employment does not fall within that class of "emergency" situations which this Court found to merit deprivation of property without a prior hearing.

The decisions of this Court have only rarely and in unusual cases tolerated the deprivation of property without a prior hearing. A brief outline of several of the cases of this type suggests the contours of this Court-created exception. In *Central Union Trust Co.* v. *Garvan,* 254 U.S. 554 (1921), the Court allowed the immediate seizure of property without prior hearing because such property was supposed to belong to the enemy in time of war. *Phillips* v. *Commissioner,* 283 U.S. 589 (1931) upheld a summary procedure used to assess income tax liability on a stock transferee in order to protect the internal revenue. *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950) and *North American Cold Storage Co.* v. *Chicago,* 211 U.S. 306 (1905) were similar cases dealing with seizure of property which constituted a threat to the public health and

well-being. In *Fahey* v. *Mallonee,* 332 U.S. 245 (1947), the Court allowed the Federal Home Loan Bank Board to have a conservator take possession of a bank before hearing. Conceding the action was a "drastic procedure", Mr. Justice Jackson justified it citing the "impossibility of preserving credit during an investigation" and alluding to the special customs and practices of the banking industry. 332 U.S., at 253-254. *Yakus* v. *United States,* 321 U.S. 414 (1944) and *Bowles* v. *Willingham,* 321 U.S. 503 (1944) upheld the summary procedures of the Emergency Price Control Act of 1942 on the grounds that in time of war they were necessary to preserve the economic well-being of the general public.

All of the cases suggest that the deprivation of property without a prior hearing will be sanctioned only when such deprivation is necessary to immediately protect a specific and compelling interest of a large segment of the public. The exception has not been applied to facilitate the functioning of the government bureaucracy or to make its personnel management more "efficient." Petitioner's argument that according the Respondent a hearing prior to suspending him "would place a burden on the municipality disruptive of government efficiency" (Br. at 28) lacks weight when contrasted with the respect accorded due process protections by the decisions of this Court.

C. The balancing of interests test is not properly used to determine whether there must be a presuspension hearing but only to establish the character of that hearing.

The decisions of this Court indicate that a balancing of interests approach has some validity when used to determine what the formal requirements of the prior hearing should be. (For an example of the balancing of interests analysis see Mr. Justice Powell's concurring opinion in

Arnett, 416 U.S., at 168-169, and his dissenting opinion in *Goss,* 419 U.S., at 591-594.) However, the Court's decisions also indicate that this analysis is not proper to assess the need for the prior hearing itself. *Roth* cited *Boddie* for the proposition that "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." 408 U.S., at 570 fn 8. But Mr. Justice Stewart also remarked in that opinion that "The constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process." 408 U.S., at 570-571, fn 8. Even conceding that the government's interests outweigh those of the Respondent, (and this is a concession impossible to make given this Court's rulings on the importance of property interests in wages, *see Sniadach* v. *Family Finance Corp.,* 345 U.S. 337, 340 (1969)), Respondent must still be allowed some sort of informal hearing procedure before he is deprived of his means of earning a living for himself and his family.

III.

THE OPINION OF THE SEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISION IN GOSS v. LOPEZ HOLDING THAT WHERE THERE HAS BEEN A DEPRIVATION OF A PROPERTY INTEREST OR THE INFRINGEMENT OF A LIBERTY INTEREST DUE PROCESS REQUIRES THERE BE A HEARING EITHER BEFORE OR IMMEDIATELY AFTER THE PROPOSED DEPRIVATION OR INFRINGEMENT.

In its opinion, the Court of Appeals applied the analytical techniques this Court has developed for dealing with the constitutional consequences of denying government employees their jobs. It began its opinion by finding that

the Respondent had a protected property interest in his employment. *Muscare* v. *Quinn,* 520 F.2d 1212, 1215 (1975) In so holding, it was consistent with this Court's decision in *Roth.* It recognized, as has this Court, that there is no fixed standard of due process but that its requirements change with the facts of each case. And, after analyzing the *Goss* decision, it concluded that:

> "In the circumstances of America's high schools, the Court (this Court) thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension. Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the corresponding penalties are potentially more damaging, for reputations, careers and substantial amounts of lost pay are at stake." 520 F.2d, at 1215. (footnote omitted)

This judgment goes no further than Mr. Justice White's opinion for the Court in *Goss* where he notes that "The Court's view has been that as long as property deprivation is not *de minimis,* its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. (citations omitted) A 10-day suspension is not *de minimis* in our view and may not be imposed in complete disregard of the Due Process Clause." 419 U.S., at 576.

It is the opinion of the Illinois Supreme Court in *Kropel* v. *Conlisk,* 60 Ill.2d 17 (1975), that is inconsistent with the decisions of this Court. In that case a member of the Chicago Police Department was summarily suspended for 30 days under authority of Illinois Revised Statutes (1973), ch. 24, par. 10-1-18.1 which reads in part that "Nothing in this Section limits the power of the superintendent to sus-

pend a subordinate for a reasonable period, not exceeding 30 days." The lower court had found this section unconstitutional. The Illinois Supreme Court, in an opinion which was purely an exercise in statutory construction, salvaged the section by reading it "in pari materia" with other sections of the Civil Service Act which form the basis on which the Respondent in this case was suspended. In effect, the Court gave police officers in Chicago the same rights firemen and other civil service employees had enjoyed under ch. 24, par. 10-1-18 which reads in part: "any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension." Although the Court never cited a single opinion of this Court, or even of its own, defining what due process requires in the case of government employee suspensions, it held that although "there are limits inherent in the fourteenth amendment to the United States Constitution" on such suspensions, providing no hearing at all for suspensions of five days or less and post suspension hearings for suspensions of over five days comported with these limits. Such a holding is contrary to that of this Court in *Goss*. That case should be read as Mr. Justice Powell has read it in his dissent in *Goss* and in his concurring and dissenting opinion in *Wood* v. *Strickland*, 420 U.S. 308 (1975). He concludes that *Goss* identifies a new constitutional right: "the right of a student not to be suspended for as much as single day without notice and a due process hearing either before or promptly following the suspension." 419 U.S., at 585. He explicitly characterizes *Goss* as "holding that a junior high school pupil routinely suspended for as much as a single day is entitled to due process." *Wood*, 420 U.S., at 329.

In the recent decision of *Boehning* v. *Indiana State Employees Assoc.*, ... U.S. ....., 44 LW 3275 (1975), this Court in a Per Curiam opinion abstained from deciding the due process question "because the controlling state statutes, as yet unconstrued by the state courts, might require the hearing demanded by respondent and so obviate decision on the constitutional issue." 44 LW 3275. The Illinois Supreme Court has here construed the relevant statutes and found that they do not require the hearing necessitated by *Goss*—to that extent this Court must find them defective.

CONCLUSION

For the reasons stated, it is submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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